

This Opinion is Not a
Precedent of the TTAB

Mailed: February 10, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Thomas D. Foster, APC

Serial No. 88233967
—

Thomas D. Foster of TDFoster – Intellectual Property Law,
for Thomas D. Foster, APC.

Alison Keeley, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

—
Before Wellington, Heasley and Allard,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Thomas D. Foster, APC (“Applicant”), a corporation, seeks registration on the Principal Register of the standard character mark SPACE COMMAND for the following goods and services:¹

Various types of books, posters, art prints, magazines, and other stationery items in International Class 16;

Various articles of clothing in International Class 25;

¹ Application Serial No. 88233967, filed December 18, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of an intent to use the mark in commerce. The identifications of goods for Classes 16, 25 and 28, are extensive and we therefore summarize these goods.

Various types of toys, including “toy spacecraft; toy rockets; toy space vehicles; toy figures; toy vehicles; toy weapons; scale model spacecraft; scale model rockets; scale model space vehicles,” in International Class 28;

and

“Providing on-line non-downloadable audio and visual recordings featuring animated entertainment, music, stories, and games for children; providing on-line non-downloadable musical recordings; providing on-line non-downloadable video game software and non-downloadable computer game software; providing on-line audio recordings featuring music, stories, dramatic performances, non-dramatic performances, learning activities for children, and games; providing on-line non-downloadable audio recordings featuring music, stories, dramatic performances, non-dramatic performances, learning activities for children, and games,” in International Class 41.

The Examining Attorney has refused registration of the mark under Section 2(a) of the Trademark Act (“the Act”), 15 U.S.C. § 1052(a), based on false suggestion of a connection with the United States Space Command. Registration has also been refused based on a requirement to disclaim the word SPACE because it is an unregistrable component of the mark, under Section 6(a) of the Act, 15 U.S.C. § 1056(a).

When the refusals were made final, Applicant appealed.² The appeal has been briefed.³

We reverse the false suggestion of a connection refusal to register, but affirm the refusal based on the requirement to disclaim SPACE.

I. Section 2(a) False Suggestion of a Connection

Section 2(a) of the Act prohibits registration on either the Principal or the Supplemental Register of a designation that consists of or comprises matter that may falsely suggest a connection with “persons, living or dead, institutions, beliefs, or national symbols” 15 U.S.C. § 1052(a). “[T]he rights protected under the § 2(a) false suggestion provision are not designed primarily to protect the public, but to protect persons and institutions from exploitation of their persona.” *Bridgestone/Firestone Research Inc. v. Auto. Club de l’Ouest de la France*, 245 F.3d 1359, 58 USPQ2d 1460, 1463 (Fed. Cir. 2001) (citing *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 217 USPQ 505, 508-09 (Fed. Cir. 1983)). A person, institution, belief or national symbol does not need to be explicitly protected

² Prior to the appeal, Applicant filed a Petition to the Director requesting that the Director “review the examining attorney’s repeated formal requirement de novo to determine whether the examining attorney’s judgment was correct.” July 4, 2020 Petition at TSDR 1-2. The Petition was dismissed on October 6, 2020. Applicant also filed a (first) Request for Reconsideration concurrently with its appeal, and this was denied by the Examining Attorney on November 30, 2020.

The application was also remanded to the Examining Attorney twice at Applicant’s request for remand based on “new and compelling evidence.” These requests were treated as second and third Requests for Reconsideration, and were denied by the Examining Attorney on, respectively, June 1, 2021 (second) and August 20, 2021 (third).

³ Applicant filed an appeal brief (at 12 TTABVUE) and, after the third Request for Reconsideration was denied, a supplemental appeal brief (at 18 TTABVUE). The Examining Attorney then filed an appeal brief (at 20 TTABVUE).

by statute in order to be protected under Section 2(a). *See, e.g., In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218 (Fed. Cir. 2009).

Also, relevant to this proceeding, the U.S. government, as well as government agencies and instrumentalities, are considered juristic persons or institutions within the meaning of the statute. 15 U.S.C. § 1052(a); Section 45 of the Act, 15 U.S.C. § 1127. *See In re Peter S. Herrick P.A.*, 91 USPQ2d 1505, 1506 (TTAB 2009) (“institutions, as used in Section 2(a), include government agencies.”); *U.S. Navy v. United States Mfg. Co.*, 2 USPQ2d 1254, 1257-58 (TTAB 1987) (“the Navy is a juristic person within the meaning of Section 45 of the Act and the Marine Corps might be argued to be an institution”); *In re Cotter & Co.*, 228 USPQ 202, 204-05 (TTAB 1985) (finding the United States Military Academy is an institution and West Point “has come to be solely associated with and points uniquely to the United States Military Academy”); *NASA v. Record Chem. Co. Inc.*, 185 USPQ 563, 565-66 (TTAB 1975) (finding the National Aeronautics and Space Administration (NASA) is a juristic person and institution). Thus, common names, acronyms and initialisms for the U.S. government or its agencies or instrumentalities can be relevant to false suggestion of connection claims.

To establish that a proposed mark falsely suggests a connection with a person or an institution, it must be shown that:

- (1) The mark is the same as, or a close approximation of, the name or identity previously used by another person or institution;
- (2) The mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution;

(3) The person or institution named by the mark is not connected with the activities performed by the applicant under the mark; and

(4) The fame or reputation of the person or institution is such that, when the mark is used with the applicant's goods or services, a connection with the person or institution would be presumed.

Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 217 USPQ 508-09 (“the *Univ. of Notre-Dame du Lac* test”). See also *In re Pedersen*, 109 USPQ2d 1185, 1188-89 (TTAB 2013) (citing *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.* in an ex parte appeal context for “providing foundational principles for the current four-part test used by the Board to determine the existence of a false connection”). See also *Piano Factory Grp., v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 2021 USPQ2d 913, at *11 (Fed. Cir. 2021); *U.S. Olympic Comm. v. Tempting Brands Netherlands B.V.*, 2021 USPQ2d 164, at *17-18 (TTAB 2021); *In re Jackson Int'l Trading Co.*, 103 USPQ2d 1417, 1419 (TTAB 2012); *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428, 429 (TTAB 1985).

A. Arguments and Evidence

Before discussing the *Univ. of Notre-Dame du Lac* test as applied to this appeal, we first review the arguments and evidence.

The Examining Attorney contends that:⁴

Applicant's mark, SPACE COMMAND is the same or a close approximation of the name of the U.S. Space Command, previously the Air Force Space Command, which is a unified combatant command in the United States Department of Defense. Specifically, at the time applicant file[d] the application, SPACE COMMAND referred to the Air Force Space Command. However, in August 2019 the SPACE COMMAND was split into a separate combatant command within the U.S. Department of

⁴ 20 TTABVUE 6-7.

Defense. Therefore, SPACE COMMAND refers to this government organization.

The Examining Attorney submitted Wikipedia evidence showing the “Air Force Space Command (AFSPC) was a major command of the United States Air Force from September 1982 to December 2019,” and was “re-designated as the United States Space Force to stand up as a new sixth service branch of the United States Armed Forces responsible for space warfare.”⁵

The United States Space Command, according to Wikipedia, is a “unified combatant command of the United States Department of Defense, responsible for military operations in outer space.”⁶ It was “reestablished” in 2019, as there was previously a United States Space Command, also described as “a functional combatant command,” that existed from 1985 until it was “inactivated” in 2002.⁷ The United States Space Command website (www.spacecom.mil, as of February 26, 2020) provides:⁸

Fact Sheet

United States Space Command (USSPACECOM) is the newest of the eleven unified commands in the Department of Defense (DoD). USSPACECOM increases the ability of the Joint Force to project power and influence, reduces decision timelines for space operations, and brings focused attention to defending U.S. interests in space. Establishing USSPACECOM is a critical step in accelerating the ability of the Joint Force to defend vital national interests and deter adversaries.

⁵ May 4, 2020 Office Action, at TSDR p. 10.

⁶ *Id.*, at TSDR pp. 2-9.

⁷ *Id.*

⁸ *Id.*, at TSDR pp. 20-22.

The Examining Attorney submitted printouts of articles from the websites of The New York Times, CNN, and Politico, each covering the same event, namely, then-President Trump's August 29, 2019 announcement of the creation of a new United States Space Command.⁹ To wit,

Trump Authorizes a Space Command. Next, He Wants a Space Force.

President Trump on Thursday authorized the creation of the United States Space Command, citing the need for a centralized unit to protect American interests in what he called "the next war-fighting domain." He described the command as a precursor to the Space Force, a sixth branch of the military that he has promised to supporters at his rallies and the wants Congress to create.

[The New York Times, August 29, 2019. The U.S. Space Command is later referred to in the article once as "the new combatant command" and once as "Space Command."]

Trump launches Space Command

President Trump announced Thursday the official establishment of the US military's Space Command. . . .

[CNN Politics, August 29, 2019. The U.S. Space Command is later referred to in the article alternatively as "the command," or the "Space Command," or "US Space Command."]

The Examining Attorney also submitted printouts from the following websites that discuss the U.S. Space Command: C4ISRNET (www.c4isrnet.com), FP (www.foreignpolicy.com), Space.Com (www.space.com), Military.Com (www.military.com), DVIDS (www.dvidshub.net), SpaceNews (www.spacenews.com), and Business Insider.¹⁰ Aside from the New York Times, CNN, and Politico, nearly

⁹ Printouts attached to October 8, 2019 Office Action, at TSDR pp. 2-16.

¹⁰ Printouts attached to May 4, 2020 Office Action, at TSDR pp. 23-79.

all of the websites provide information to a targeted audience, not the general public.¹¹

The Examining Attorney concludes that “as shown by this media usage, SPACE COMMAND points uniquely to this organization and is commonly used as such in the media.”¹² When the United States Space Command was created, “the wording ‘SPACE COMMAND’ alone was commonly used to indicate this organization . . . [and s]ince then, the organization has commonly been referred to as ‘SPACE COMMAND’ alone.”¹³

Applicant, on the other hand, argues that its proposed mark, SPACE COMMAND, “does not point unerringly to the U.S. Government or any military arm of the U.S. Government.”¹⁴ Applicant asserts that the term “space command” is a “generic name of a military organization with responsibility for space operations and warfare.”¹⁵ In support, Applicant submitted a Wikipedia entry for “Space command,” which provides that a “space command is typically a joint organization or organized within a larger military branch.”¹⁶ In addition to the U.S. Space Command, the Wikipedia

¹¹ For example, the C4ISRNET website involves “artificial intelligence, unmanned, battlefield tech, space, electronic warfare . . .,” DVIDS is an abbreviation for “defense visual information distribution service,” and the Military.com website provides information regarding U.S. military “benefits, news, Veteran Jobs, Military Life . . .”

¹² 20 TTABVUE 8.

¹³ *Id.*

¹⁴ 18 TTABVUE 12.

¹⁵ *Id.*

¹⁶ 8 TTABVUE 13; a complete copy of the Wikipedia entry for “Space command” was submitted with Applicant’s initial appeal brief (at 12 TTABVUE 27-31) and before the application was remanded for a second time to the Examining Attorney.

entry lists other countries' "space commands," including a "Russian Space Command," a "United Kingdom Space Command," a "French Space Command," an "Iranian Space Command," and an "Australian Space Command."¹⁷ To further prove this point, Applicant submitted online articles and materials to "show that the U.S. public has been informed to some appreciable extent that Russia, France, India and Japan also have 'space command' centers."¹⁸ Applicant argues that the "American public can just as easily equally associate the term with Space Commands found in China, France, Britain and NATO."¹⁹

Applicant further argues that the "US Department of Defense recognizes and admits by amending their trademark application to the Supplemental Register that other governments and private entities that deal with space operations can describe such activities as 'Space Commands.'"²⁰ Applicant refers to an application filed by the U.S. Marine Corps for the mark MARINE FORCES SPACE COMMAND for counseling, charitable education, and information services.²¹ The application was initially refused registration on the Principal Register for being merely descriptive of the services, but was amended by the applicant (U.S. Marine Corps) to seek

¹⁷ *Id.*; 12 TTABVUE 29.

¹⁸ 18 TTABVUE 17, referring to printouts of articles attached to Response filed on September 16, 2019 and Request for Reconsideration filed on November 4, 2020, at TSDR 13-15.

¹⁹ *Id.* at 18.

²⁰ *Id.* at 3, 6.

²¹ Copies of the application file, an Office Action, and response thereto were attached to Applicant's (third) Request for Remand/Reconsideration, 14 TTABVUE 8-25.

registration on the Supplemental Register. The application was approved by the Office.

Applicant also submitted a “Google survey” and argues that the “results of this survey show that the term SPACE COMMAND certainly does not point uniquely and unmistakably to any U.S. government entity let alone the U.S. Department of Defense.”²² The survey consists of 4 pages from the Google website purportedly showing that, between March 28, 2021 and April 7, 2021, approximately 1500 respondents were asked “The term SPACE COMMAND points uniquely and unmistakably in my mind to:” and were provided the following choices for responses: “NASA ... None of these ... The US Department of Defense ... A television series ... NATO.”²³ The percentages of answers given by respondents were, respectively, 40.8% - 31.4% - 16.7% - 8.0% - 3.1%.²⁴

In terms of how Applicant’s mark will be perceived by consumers, Applicant states that it “intends to offer a playful retro style line of goods and services under its SPACE COMMAND mark which will pay homage to collectable space themed toys from the 80’s.”²⁵ Applicant submitted evidence of at least one other entity’s prior use of “Space Command” in connection with toys:²⁶

²² 18 TTABVUE 19; Google survey printouts attached to Applicant’s (second) Request for Reconsideration (at 8 TTABVUE 9-12).

²³ 8 TTABVUE 10.

²⁴ *Id.*

²⁵ 18 TTABVUE 10.

²⁶ April 8, 2020 Response, TSDR p. 12. The printout was accessed from a personal website and is described as “Golob the Humanoid’s Tribute Page to the Ultimate Retro 1980’s Sci-Fi



Applicant suggests, in this case, “the better practice is to allow the application to be published and wait until a Statement of Use is filed and then, depending on the exact goods offered by [Applicant], and the commercial impression that they make, to make the decision whether or not to raise a 2(a) false suggestion refusal.”²⁷ In addition, Applicant has “raised some doubt that the term ‘space command’ points unerringly to the U.S. Government or any military arm of the U.S. Government let alone the now defunct Air Force Space Command or the newly created United States

Collectible...” (www.golobthehumanoid.com). There is no evidence showing the degree of consumer exposure, if any, for this website.

²⁷ 18 TTABVUE 22.

Space Command,” citing to the Board’s decision in *In re MC MC S.r.l.*, 88 USPQ2d 1378, 1381 (TTAB 2008) (“Where contradictions in the evidence raise significant doubt as to whether the examining attorney has established the elements of false suggestion of a connection, such doubt should be resolved in applicant’s favor.”).

B. Analysis

We now look to the *Univ. of Notre-Dame du Lac* test to determine whether there is a false suggestion of a connection in this case. At the outset, we note that there is no real dispute that Applicant, and its goods and services, have no affiliation or connection with the United States Space Command, or the U.S. Department of Defense, or any other U.S. governmental entity.²⁸ Thus, that part of the test is met. As for the remaining three elements of the test, we address these in turn.

1. Is SPACE COMMAND the Same as, or a Close Approximation of a Previously-Used ‘United States Space Command’?

In making a finding as to this question, the Board has held that “the similarity required for a ‘close approximation’ is akin to that required for a likelihood of confusion under § 2(d) and is more than merely ‘intended to refer’ or ‘intended to evoke.’” *The Pierce-Arrow Soc. v. Spintek Filtration, Inc.*, 2019 USPQ2d 471774, *5

²⁸ In its brief, Applicant argues that the Examining Attorney failed to meet the “burden to show that each and every one of the identified goods would be offered by the Government.” 18 TTABVUE 21. This, however, is not the essence of the factor. Rather, the type of “connection” contemplated by Section 2(a) has been described as “a commercial connection, such as an ownership interest or commercial endorsement or sponsorship of applicant’s [goods or] services,” and this type of connection “would be necessary to entitle applicant to register the involved mark.” *In re Sloppy Joe’s Int’l Inc.*, 43 USPQ2d 1350, 1354 (TTAB 1997). Here, as the Examining Attorney correctly points out, “Applicant is Thomas D. Foster, APC a California corporation . . . and has not alleged any actual connection to the United States Space Command.” 20 TTABVUE 9. Accordingly, we find no connection.

(2019 TTAB) (quoting *Bos. Athletic Ass'n v. Velocity, LLC*, 117 USPQ2d 1492, 1497 (TTAB 2015)). Applicant's mark must "do more than simply bring Opposer's name to mind." *Id.*; see also *Bos. Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1593 (TTAB 2008) (test for false suggestion of a connection more stringent than in disparagement, where reference to persona suffices).

This part of the test also requires "by implication that the person or institution with which a connection is falsely suggested must be the prior user." *In re Nuclear Research Corp.*, 16 USPQ2d 1316, 1317 (TTAB 1990) (false suggestion of a connection U.S. Nuclear Regulatory Commission refusal was "ill founded" and reversed by Board because applicant was first user of initialism NRC). See also *In re Mohawk Air Services, Inc.* 196 USPQ 851, 854-55 (TTAB 1977) and *Buffett v. Chi-Chi's.*, 226 USPQ at 429. See also TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1203.03(b)(i) (July 2021); J. Thomas McCarthy, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 19:76 (5TH ed. 2021) ("The phrase 'falsely suggest a connection with' in § 2(a) necessarily requires by implication that the person or institution with whom a connection is suggested must be the prior user."). Prior use in the context of a false suggestion of a connection, however, "may be found when one's right to control the use of its identity is violated, even if the name claimed to be appropriated was never commercially exploited as a trademark or in a manner analogous to trademark use." *In re Pedersen*, 109 USPQ2d at 1193; see also *In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1644 (TTAB 2015) (ROYAL KATE creates a commercial impression that refers to Kate Middleton even though she has never used the identifier).

Here, we find SPACE COMMAND is a close approximation of United States (or “U.S.”) Space Command for purposes of falsely suggesting a connection. In comparing the mark with the name of the military organization, the only difference is the prefix of descriptive words “United States” (or “U.S.”) that serve to identify the agency as being part of the United States government. In similar cases where the only distinction is the addition of a descriptive or generic term, the Board has found the mark and an identity to be close approximations of one another for purposes of a false suggestion of a connection analysis. *See, e.g., Pierce-Arrow*, 2019 USPQ2d 471774, *6 (proposed mark PIERCE-ARROW found to be a close approximation of “The Pierce Arrow Society” because the term “society” is descriptive).

Even though the proposed mark is a close approximation of U.S. Space Command, the record does not establish that the latter is the prior user. According to the Wikipedia evidence, the U.S. Space Command was inactive or non-existent prior to December 18, 2018, when Applicant filed the involved application. Rather, the evidence shows that U.S. Space Command was “reestablished” in August of 2019, approximately 17 years after the first U.S. Space Command was “inactivated” in 2002. The Examining Attorney acknowledges as much in arguing that “at the time applicant file[d] the application, SPACE COMMAND referred to the Air Force Space Command.”²⁹ The evidence further shows that the Air Force Space Command was “redesignated as the U.S. Space Force and elevated to become a military service.”³⁰

²⁹ 20 TTABVUE 6.

³⁰ May 4, 2020 Office Action, at TSDR p. 3.

With respect to the Examining Attorney's contention that "in August 2019 the [Air Force Space Command] was split into a separate combatant commands within the U.S. Department of Defense"³¹ and "Space Command" now refers to the U.S. Space Command, this is not supported by the record. The Air Force Space Command did not become or merge into the U.S. Space Command, but became known as the U.S. Space Force, a separate organization. The Wikipedia printouts and the official U.S. Space Command website contradict the assertion that the Air Force Space Command is a predecessor of the U.S. Space Command. Put simply, the record does show that the Air Force Space Command became the U.S. Space Command; nor does the evidence show that the public or the government agencies use "Space Command" to refer to the U.S. Space Command as continuation of the U.S. Air Force Space Academy. *Cf. In re Herrick*, 91 USPQ2d 1505, 1508 (applicant's mark U.S. CUSTOMS SERVICE (with design) falsely suggests a connection with the U.S. Customs and Border Protection (USCBP) agency because the U.S. Customs Service agency merged into the USCBP and evidence shows that it "still refers to itself as the U.S. Customs Service as do members of the public.").

In sum, despite our finding that Applicant's proposed mark, SPACE COMMAND, is a close approximation of the governmental agency U.S. Space Command, we do not find on this record that the agency's name was in use on December 18, 2018, when Applicant filed its application. Accordingly, on this basis, there cannot be a false suggestion of a connection. *In re Nuclear Research Corp.*, 16 USPQ2d 1316.

³¹ *Id.* at 7.

2. Does SPACE COMMAND point uniquely and unmistakably to the U.S. Space Command? Is the fame or reputation of the U.S. Space Command such that, when SPACE COMMAND is used with Applicant's goods and services, a connection with the U.S. Space Command would be presumed?

Although we do not find the name of the governmental agency "U.S. Space Command" was in use as of Applicant's filing date and this, alone, suffices for reversing the refusal, for the sake of completeness we address the remaining two prongs of the false suggestion of a connection test. We discuss these elements together because, as phrased above in question format, we answer them both in the negative for essentially the same reasons.

The U.S. Space Command was created recently, in late 2019, and the record does not demonstrate that in the brief time since its creation, it has become well-known to the general public. Thus, we cannot find that the public has come to understand SPACE COMMAND as pointing 'uniquely and unmistakably' to the U.S. Space Command. It lacks the necessary 'fame or reputation' necessary for consumers, who may encounter Applicant's mark, SPACE COMMAND, to mistakenly believe there is a connection with the U.S. Space Command.

The articles from the websites of CNN, New York Times, and Politico, all covering the single event involving the August 29, 2019 announcement of the creation of the U.S. Space Command are relevant. However, these articles are limited to that one event. Pointedly, since announcement, there is a void of evidence showing that the U.S. Space Command featured in the media, or that the general public has been exposed to use of the term "Space Command" to refer to the agency. Thus, it is difficult

to assess whether the announcement had any measurable or memorable impact on the American public. As previously noted, the other online articles appear to target specific audiences, such as those interested in military or defense news, space technology, etc., rather than the general public.

There are only a few instances, and thus a very weak showing, of the term “Space Command,” alone, being used to refer to the U.S. Space Command. Indeed, nearly all of the online articles that do this only do so after first using the full name “U.S. Space Command.” For example, the New York Times article titled, “Trump Authorizes a Space Command. Next, He Wants a Space Force,” begins with the sentence “President Trump on Thursday authorized the creation of the United States Space Command, citing the need for ...”³² There is very little showing that these few articles, or Trump’s announcement, made a measurable impact on the public as to the new the U.S. Space Command such that SPACE COMMAND points uniquely to this organization.

It is also worth noting that the U.S. Space Command agency does not appear to refer to itself as simply “Space Command.” The official “United States Space Command Department of Defense” website printouts, submitted by the Examining Attorney, show use of either the full name of the organization or an abbreviated “USSPACECOM.”³³ *Cf. In re Herrick*, 91 USPQ2d at 1508 (evidence showing agency “still refers to itself as the U.S. Customs Service as do members of the public.”)

³² October 8, 2019 Office Action, at TSDR pp. 2-3. The CNN and Politico online articles feature similar headlines followed by the full name.

³³ *See, e.g.*, May 4, 2020 Office Action, at TSDR pp. 19-22.

“Space command,” as the evidence shows, describes a “military organization with responsibility for space operations and warfare.” Several countries, as well as NATO, have their own “space commands.” Although there may be a predisposition for American consumers to believe that a reference to a military organization would be for one in the United States, we cannot assume this to be the case here, especially given that there is insufficient evidence showing that the U.S. Space Command is a well-known organization. It is likely the public will understand SPACE COMMAND as generally referring to a space operations or warfare organization without any particular national affiliation.

We have considered Applicant’s Google survey evidence, but do not rely it in coming to our ultimate conclusion. Although “[t]he Board may be somewhat more lenient in its approach in the consideration of surveys in ex parte proceedings than inter partes proceedings,” TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208 (June 2021), we must nevertheless consider the survey methodology. In this instance, we have little to no information regarding how the survey was conducted or how the sample was selected other than what is provide in the Google printouts. *In re Van Valkenburgh*, 97 USPQ2d 1757, 1767 (TTAB 2011) (finding “no basis on which to conclude that the survey is based on scientifically valid principles” where the survey consisted of questionnaires distributed to an unknown number of people who filled them out and mailed them back to applicant’s counsel). Indeed, the survey is not supported by an affidavit or declaration. Similarly, the evidence involving the application filed by the U.S. Marine Corps for the mark

MARINE FORCES SPACE COMMAND has little bearing on whether Applicant's mark falsely suggests a connection with the U.S. Space Command. It is well settled that the Board is not bound by prior decisions of examining attorneys to register other marks, and that each case before us must be resolved on its own record and merits. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). To be clear, we would reach the same result in this appeal without the Google survey or U.S. Marine Corps application evidence.

In sum, based on the arguments and the record, even though Applicant's proposed mark, SPACE COMMAND, is a close approximation of U.S. Space Command, we are not persuaded that it points uniquely and unmistakably to the governmental organization. It has also not been established that the U.S. Space Command agency has the fame or reputation with the American public such that Applicant's use of SPACE COMMAND on the identified goods and services would lead to a false presumption of a connection. Accordingly, these two elements of the *Univ. of Notre-Dame du Lac* test have not been satisfied.

C. Conclusion

Applicant's proposed mark, SPACE COMMAND, does not falsely suggest a connection to the U.S. Space Command, a governmental entity within the U.S. Department of Defense, because several parts of the *Univ. of Notre-Dame du Lac* test have not been met, namely: it has not been demonstrated that "U.S. Space Command" was in use as of the filing date of the involved application; Applicant's proposed mark does not point uniquely and unmistakably to the U.S. Space Command; and U.S.

Space Command lacks the necessary fame or reputation for any presumption of a connection should SPACE COMMAND be used by Applicant on the goods and services identified in the application.

II. Disclaimer Requirement

Section 6(a) of the Act provides that “The Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.” 15 U.S.C. § 1056(a). *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (TTAB 2013) (citing *In re Franklin Press, Inc.*, 597 F.2d 270, 201 USPQ 662, 665 (CCPA 1979)). If the Applicant does not comply with the disclaimer requirement, the Examining Attorney may refuse registration of the entire mark. *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262 (Fed. Cir. 2015).

Again, the Examining Attorney refused registration of Applicant’s mark pursuant to Section 6(a) based on Applicant’s failure to comply with a requirement to disclaim SPACE because it is merely descriptive of Applicant’s goods and services within the meaning of the Act Section 2(e)(1), and thus is an unregistrable component of the mark. 15 U.S.C. § 1052(e)(1).

Merely descriptive terms are subject to disclaimer if the mark in which they appear is otherwise registrable. *See, e.g., In re Omaha Nat’l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re RiseSmart, Inc.*, 104 USPQ2d 1931, 1934 (TTAB 2012). A term is considered to be merely descriptive under Section 2(e)(1) of the Trademark Act if it immediately conveys knowledge of a quality, feature, function, or

characteristic of the goods or services with which it is used. *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012).

However, a disclaimer will not be required if the otherwise unregistrable component is inseparable from and considered “unitary” with registrable matter. TMEP § 1213.05. A mark or portion of a mark is considered “unitary” when it “creates a commercial impression separate and apart from any unregistrable component.” *Id.* Thus, “a descriptive element in some marks may lose its descriptive significance if integrated with other arbitrary terms.” *Dena Corp. v. Belvedere Int’l Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1050 (Fed. Cir. 1991). As the Court of Appeals for the Federal Circuit described it, a unitary mark has “certain observable characteristics”:

Specifically, its elements are inseparable. In a unitary mark, these observable characteristics must combine to show that the mark has a distinct meaning of its own independent of the meaning of its constituent elements. In other words, a unitary mark must create a single and distinct commercial impression.

Id. at 1052.

The focus of an inquiry into whether a phrase, or the mark as a whole, is unitary depends on “how the average purchaser would encounter the mark under normal marketing of such goods and also ... what the reaction of the average purchaser would be to this display of the mark.” *Id.* (quoting *In re Magic Muffler Serv., Inc.*, 184 USPQ 125, 126 (TTAB 1974)).

The Examining Attorney argues that the “evidence demonstrates that, in the context of the goods SPACE merely indicates the category or theming of the goods

and so merely describes a characteristic of these goods and services.”³⁴ In support, she points to the definition: “space: the expanse in which the solar system, stars, and galaxies exist; the universe,”³⁵ and evidence showing various “space” themed goods.³⁶ The evidence includes printouts from The Planets website offering “The Best Space Gifts for Space Lovers – 2020,” including “from star projectors to adult LEGO sets and galaxy hoodies to constellation mugs, there is something for all types of space lovers out there.”³⁷

Applicant acknowledges in its brief that it “intends to offer a playful retro style line of goods and services under its SPACE COMMAND mark which will pay homage to collectable space themed toys from the 80’s.”³⁸ However, Applicant argues that SPACE COMMAND “will be perceived by purchasers as a unitary expression,” and thus a disclaimer of the single term would be improper.³⁹ Specifically, Applicant argues that “SPACE COMMAND creates a commercial impression separate and apart from any unregistrable component” because “a ‘space command’ is a generic term for a center that tracks debris and threats.”⁴⁰

³⁴ 20 TTABVUE 15.

³⁵ Copy of definitions attached to March 14, 2019 Office Action, TSDR pp. 2-3, and May 4, 2020 Office Action, TSDR pp. 87-88.

³⁶ May 4, 2020 Office Action, TSDR pp. 89-110.

³⁷ *Id.* at p. 89.

³⁸ 18 TTABVUE 10.

³⁹ *Id.* at 23.

⁴⁰ *Id.* at 24.

We agree with the Examining Attorney that the term SPACE is merely descriptive of Applicant's goods and services. We are also not persuaded that the entire mark, SPACE COMMAND, is a unitary term. While various countries have their own "space commands," we do not find a consumer encountering SPACE COMMAND in connection with the goods and services identified in the application would perceive the term as conveying a distinct meaning of its own, independent of the meaning of its constituent elements. The term SPACE in the proposed mark would still immediately convey to the consumer that the goods and services have a "space" theme and thus it is merely descriptive.

In sum, because Applicant's proposed mark is not unitary and the term SPACE is merely descriptive of the identified goods and services in the application, it must be disclaimed.

Decision: The refusal to register Applicant's mark SPACE COMMAND based on a false suggestion of a connection with the U.S. Space Command, under Section 2(a) of the Trademark Act, is reversed.

However, the refusal to register the mark in the absence of a disclaimer of SPACE, under Section 6(a), is affirmed.⁴¹

⁴¹ If Applicant submits to the Board the required disclaimer of SPACE, within thirty days of this decision, the requirement for disclaimer will have been met and this application will proceed. *See* Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g). A properly worded disclaimer should read as follows: "No claim is made the exclusive right to use SPACE apart from the mark as shown."